Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02–453 OF 2005
ZALEHA ZAHARI, ABU SAMAH NORDIN AND WAN ADNAN MUHAMAD JJCA
16 DECEMBER 2009

Civil Procedure — Judicial precedent — Per incuriam — Stare decisis — Whether High Court bound to follow decision of Court of Appeal in case of Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830

Companies and Corporations — Winding up — Set aside winding up order, application to — Dismissed by High Court — Appeal against — Whether court had power to set aside winding up order which had been perfected and duly sealed

When the respondent presented a petition to wind up the appellant, the latter neither entered an appearance nor filed an affidavit to oppose it. As such, on 11 July 2003, the court made a winding up order against the appellant. On 10 June 2004, the appellant filed an application to set aside the winding up order on the grounds that the winding up order was made in default as the appellant had no knowledge of the winding up proceedings. The application was supported by an affidavit affirmed by one Noor Salmah bt Bunnawi ('Noor'), who claimed to be a director of the appellant. The appellant submitted that it had handed over the s 218 notice, which was served on it by the respondent, to a third party to handle. The appellant therefore averred that it had been under the impression that all necessary action to oppose the petition had already been undertaken by the third party. The appellant further claimed that it only became aware of the winding up order through one of its directors, who had been blacklisted for being one of the directors of the appellant. In its application the appellant also alternatively prayed that the winding up order be stayed under s 243 of the Companies Act 1965 ('the Act'). The respondent opposed the application on the grounds that the appellant's application to set aside a perfected and sealed winding up order was irregular and wrong in law. Relying on the case of *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram* [1995] 1 MLJ 830 ('*Vijayalakshmi* case') the respondent submitted that the appellant ought to have appealed against the order instead of applying to have it set aside. The High Court judge dismissed the appellant's application with costs and held that he was bound by the decision of the Court of Appeal in *Vijayalakshmi*'s case. This was the appellant's appeal against the decision of the High Court in which he

submitted that *Vijayalakshmi*'s case was decided per incuriam. The main issue for determination in this case was whether the court had the power to set aside a winding up order which had been perfected and duly sealed.

Held, dismissing the appeal with costs:

(1) It had not been shown that *Vijayalakshmi*'s case was decided per incuriam. There was no reference made to any other case previously decided by the Court of Appeal or the Federal Court which had decided otherwise. Neither was there any submission made by the appellant that *Vijayalakshmi*'s case was decided in contravention of any statutory provisions (see para 15).

(2) The High Court cases relied upon by the appellant were clearly distinguishable from the instant case, in that, they did not consider whether the High Court had the jurisdiction to set aside a winding up order after it was perfected and duly sealed. In any case the cases cited by the appellant were decided before the *Vijayalakshmi* case (see para 24).

(3) There is no express provision in the Act or in the Companies (Winding Up) Rules 1972 that a winding up order which had been perfected and duly sealed cannot be set aside or rescinded save in those circumstances where the court may exercise its inherent jurisdiction. As such the proper remedy would be to apply for a stay under s 243 of the Act or to appeal against the winding up order made against it. However, under s 243 of the Act only a liquidator or any creditor or contributory is entitled to apply for a stay of the winding up order. Thus, under s 243 of the Act, Noor who claimed to be a director of the appellant was not qualified and had no locus standi to apply for a stay of the winding up order (see paras 7 & 25).

(4) Further O 35 r 2 of the Rules of the High Court 1980 could not be invoked to set aside a winding up order on the grounds that it was made in default. This is because the Act, being a special law on matters pertaining to companies winding up, does not expressly provide for it (see para 25).

[Bahasa Malaysia summary

Apabila responden mengemukakan petisyen penggulungan terhadap perayu, perayu tidak memasukkan kehadiran ataupun memfailkan afidavit membantah petisyen tersebut. Oleh itu, pada 11 Julai 2003, mahkamah membuat perintah penggulungan terhadap perayu. Pada 10 Jun 2004, perayu memfailkan permohonan mengetepikan perintah penggulungan atas alasan bahawa perintah penggulungan tersebut telah dibuat secara ingkar kerana perayu tidak mempunyai pengetahuan tentang prosiding penggulungan tersebut. Permohonan tersebut telah disokong oleh afidavit yang diikrarkan

oleh Noor Salmah bt Bunnawi ('Noor'), yang mendakwa dia adalah seorang pengarah perayu. Perayu menghujah bahawa ia telah menyerahkan notis s 218, yang telah disampaikan oleh responden, kepada pihak ketiga untuk menanganinya. Perayu lantaran itu menegaskan bahawa ia menganggap bahawa semua tindakan perlu bagi membantah petisyen tersebut telah pun dilakukan oleh pihak ketiga. Perayu seterusnya mendakwa bahawa dia hanya sedar mengenai perintah penggulungan tersebut melalui salah seorang daripada pengarahnya, yang telah disenarai hitam kerana menjadi pengarah perayu. Dalam permohonannya perayu juga secara alternatif memohon agar perintah penggulungan tersebut digantung di bawah s 243 Akta Syarikat 1965 ('Akta tersebut'). Responden membantah permohonan tersebut atas alasan bahawa permohonan perayu untuk mengetepikan perintah penggulungan yang telah dimeterai dan sempurna adalah tidak teratur dan salah di sisi undang-undang. Bergantung pada kes *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram* [1995] 1 MLJ 830 ('kes *Vijayalakshmi*') responden menghujah bahawa perayu sepatutnya membuat rayuan terhadap perintah tersebut daripada memohon untuk mengetepikannya. Hakim Mahkamah Tinggi menolak permohonan perayu dengan kos dan memutuskan bahawa beliau terikat dengan keputusan Mahkamah Rayuan dalam kes *Vijayalakshmi*. Ini ialah rayuan perayu terhadap keputusan Mahkamah Tinggi tersebut di mana perayu menghujah bahawa yang kes *Vijayalakshmi* telah diputuskan per incuriam. Isu utama untuk diputuskan dalam kes ini adalah sama ada mahkamah mempunyai kuasa mengetepikan perintah penggulungan yang telah disempurnakan dan dimeterai.

Diputuskan, menolak rayuan dengan kos:

(1) Ia tidak ditunjukkan bahawa kes *Vijayalakshmi* telah diputuskan per incuriam. Tidak ada rujukan dibuat kepada apa-apa kes lain yang diputuskan dahulu oleh Mahkamah Rayuan atau Mahkamah Persekutuan yang telah memutuskan sebaliknya. Tidak juga terdapat sebarang penghujahan yang dibuat oleh perayu bahawa kes *Vijayalakshmi* telah diputuskan bertentangan dengan mana-mana peruntukan undang-undang (lihat perenggan 15).

(2) Kes-kes Mahkamah Tinggi yang disandarkan oleh perayu jelas boleh dibezakan daripada kes ini, dalam mana, ia tidak menimbangkan sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk mengetepikan perintah penggulungan selepas ia disempurnakan dan dimeterai. Walau bagaimanapun kes-kes yang disebut oleh perayu diputuskan sebelum kes *Vijayalakshmi* (lihat perenggan 24).

(3) Tiada peruntukan nyata dalam Akta tersebut atau dalam Kaedah-Kaedah (Penggulungan) Syarikat 1972 bahawa satu perintah penggulungan yang telah disempurnakan dan dimeterai tidak boleh

diketepikan atau dibatalkan kecuali dalam keadaan-keadaan di mana mahkamah boleh melaksanakan bidang kuasa semulajadinya. Oleh itu remedi yang sesuai adalah untuk memohon penggantungan di bawah s 243 Akta tersebut atau merayu terhadap perintah penggulungan yang dibuat terhadapnya. Bagaimanapun, di bawah s 243 Akta tersebut hanya seorang penyelesai atau pemiutang atau pencarum yang berhak memohon penggantungan perintah penggulungan. Oleh itu, dibawah s 243 Akta tersebut, Noor yang mendakwa dirinya pengarah perayu tak layak dan tidak mempunyai locus standi bagi memohon untuk penggantungan perintah penggulungan tersebut (lihat perenggan 7 & 25).

(4) Selanjutnya A 35 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 tidak boleh digunakan untuk mengetepikan perintah penggulungan atas alasan ianya telah dibuat akibat keingkaran. Ini ialah kerana Akta tersebut, yang merupakan undang-undang khas bagi hal-hal berkaitan dengan penggulungan syarikat, tidak dengan khususnya memperuntukkannya (lihat perenggan 25).]

Notes

For a case on decisions per incuriam decisions, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 4318.

For cases on winding up in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 973–1601.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bridon New Zealand Ltd v Tent World Ltd [1992] 3 NZLR 725, HC (refd)

Calmex Ltd & Anor v C Lila Ltd & Ors [1989] 1 All ER 485, Ch D (refd)

City Audio Sdn Bhd v Pengangkutan Kargo Udara Mas Sdn Bhd [1993] MLJU 560; [1994] 1 AMR 8, Supp 355, HC (distd)

Crown Bank, Re (1890) 44 Ch D 634, Ch D (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)

Duke v Reliance Systems Ltd [1987] 2 WLR 1225, CA (refd)

George Ward Stell Pty v Kizkot Pty Ltd (1989) 15 ACLR 464 (refd)

Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Intermain Properties Ltd, Re [1986] BCLC 265 (refd)

Kensington Swan v New Zealand Fisheries Ltd [1989] 2 PRNZ 141 (refd)

Kim Maxwell Ltd, Re [1992] 1 NZLR 69, HC (refd)

Krextile Holdings Pty Ltd v Widdows Re Brush Fabrics Proprietary Ltd [1974] VR 689, SC (refd)

Mui Bank Bhd v Golden Hornbill Hotel Sdn Bhd [1993] 1 MLJ 290, HC (distd)

A *Morelle Ltd v Wakeling* [1955] 2 QB 379, CA (refd)
Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd [1996] 4 MLJ 343, HC (refd)
Rick Wilson Pty Ltd, Re (1982) 7 ACLR 354 (refd)
Ross v PJ Heeringa Ltd [1970] NZLR 170, SC (refd)
B *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325, SC (refd)
Teng Foh t/a Teng Foh Construction v Liwu Realty Sdn Bhd [1989] 2 MLJ 425, HC (distd)
C *Vijayalaksmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830, CA (refd)
XL Petroleum Pty Ltd, Re [1971] VR 560 (refd)

Legislation referred to

D Companies Act 1948 [UK]
Companies Act 1965 ss 218, 233, 243, 243(1)
Companies (Winding Up) Rules 1972
High Court Rules [NZ] rr 486, 540
Insolvency Rules 1986 [UK] r 7.47, 7.47(1)
E Rules of the High Court 1980 O 1 r 2, O 35 r 2

Appeal from: Winding up petition No D4–28–267 of 2003 (High Court, Kuala Lumpur)

Fahri Azzat (Farah Mohd Afzal with him) (Azzat & Izzat) for the appellant.
F *Respondent not present.*

Abu Samah Nordin JCA:

G **[1]** This appeal arose from the decision of the Kuala Lumpur High Court dismissing the appellant's application to set aside the winding up order granted against it. It concerns the power of the court to set aside a winding up order which had been perfected and duly sealed.

H **[2]** The facts are simple and straightforward. The appellant was wound up by the court on 11 July 2003. All of the documents in relation to the winding up proceedings including the notice of demand under s 218 of the Companies Act 1965 and the petition were duly served on the appellant but no explanation was given why it failed to appear before the court. There was
I no affidavit in opposition to the said petition. Neither did it appeal against the winding up order.

[3] On 10 June 2004, almost a year after the said order was made the appellant filed an application, by way of a notice of motion, to set aside the

winding up order and that a new hearing date of the petition be fixed. Alternatively, it prayed that the winding up order be stayed under s 243 of the Companies Act 1965.

[4] The affidavit in support of the application dated 10 June 2004 was affirmed by one Noor Salamah bt Bunnawi who claimed to be a director of the appellant and that she was duly authorised to affirm the affidavit by the said appellant. She further claimed that the facts deposed therein were based on the appellant's record and documents in her possession.

[5] She affirmed the affidavit notwithstanding the clear provision of s 233 of the Companies Act 1965 which states that where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all of the properties and things in action to which the company is or appears to be entitled. In *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325 at p 327 the Supreme Court (as it then was) held that, 'after a winding up order is made, generally speaking no one but the liquidator can act on behalf of the company'.

[6] The application is based on the ground that the appellant had no knowledge of the winding up proceedings as it had handed over the s 218 notice served on it to a third party, ie, Mohd Najib bin Abu Bakar, who had promised to take the necessary actions to oppose the petition. It was therefore submitted that this was an order made in default and should be set aside. The appellant only knew of the winding up order after one of its directors, namely Anuar bin Abdullah discovered in January 2004 that his name had been blacklisted as being one of the directors of the appellant.

[7] Noor Salamah bt Bunnawi did not in her affidavit state that she was a creditor or a contributory of the appellant. It is necessary to disclose this fact as only the liquidator or any creditor or contributory is entitled to apply for a stay of the winding up order under s 243 of the Companies Act 1965. A director is not qualified and has no locus standi to apply for a stay of the winding up order under s 243 of the said Act: See *Sri Hartamas Development Sdn Bhd*.

[8] The respondent opposed the application on the ground that it was irregular and wrong in law. The winding order had been duly perfected and sealed. The appellant should have appealed against the said winding up order instead of applying to have it set aside: see *Vijayalaksmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830; *Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd* [1996] 4 MLJ 343. In *Vijayalaksmi*'s case, the Court of Appeal held that a winding up order cannot

be discharged or rescinded after it had been made and that the only remedy is to apply for a stay of proceedings under s 243(1) of the Companies Act 1965.

[9] The appellant on the other hand relied on the following cases: *Teng Foh t/a Teng Foh Construction v Liwu Realty Sdn Bhd* [1989] 2 MLJ 425; *Mui Bank Bhd v Golden Hornbill Hotel Sdn Bhd* [1993] 1 MLJ 290 and *City Audio Sdn Bhd v Pengangkutan Kargo Udara Mas Sdn Bhd* [1993] MLJU 560; [1994] 1 AMR 8, Supp 355. In all these cases the High Court had set aside the respective winding up orders upon application in the same proceedings rather than by way of an appeal.

[10] The appellant also relied on some foreign authorities, namely, *Bridon New Zealand Ltd v Tent World Ltd* [1992] 3 NZLR 725; *Calmex Ltd & Anor v C Lila Ltd & Ors* [1989] 1 All ER 485; *George Ward Stell Pty v Kizkot Pty Ltd* (1989) 15 ACLR 464, and *Re Rick Wilson Pty Ltd* (1982) 7 ACLR 354.

[11] The learned High Court judge held that he was bound by the decision of the Court of Appeal in *Vijayalaksmi*'s case and that the cases relied upon by the appellant can no longer be considered good law. He accordingly dismissed the application with costs.

[12] Before us, it was submitted that *Vijayalaksmi*'s case was decided per incuriam. What then is per incuriam? Sir John Donaldson MR in the English Court of Appeal in *Duke v Reliance Systems Ltd* [1987] 2 WLR 1225 explained it as follows:

> I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might here reached a different conclusion. That appears to me to be the position at which we have arrived today.

[13] The abovesaid passage had been reproduced verbatim and approved by the Supreme Court (as it then was) in the *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 at p 46. Abdoolcader SCJ in that case further explained the words per incuriam thus:

> 'Per incuriam' is only Latin for 'through want of care' or 'through inadvertence' or 'by mistake'.

[14] Sir Raymond Evershed MR in *Morelle Ltd v Wakeling* [1955] 2 QB 379, which was referred to by the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 construed the words per incuriam as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'.

[15] It had not been shown to us that *Vijayalaksmi*'s case was decided per incuriam. We were not referred to any other case previously decided by this court or the Federal Court which had decided otherwise. It was not submitted to us that *Vijayalaksmi*'s case was decided in contravention of any statutory provisions. This court in *Vijayalaksmi*'s case had considered the relevant provisions of the Companies Act 1965, the Companies Act 1948 (UK), the Insolvency Rules 1986 as well as cases both in the United Kingdom and Australia before holding that a winding up order cannot be discharged or rescinded after it had been made. It pointed out that there is no rule of practice or statutory provision in this country which is equivalent to r 7.47(1) of the English Insolvency Rules 1986, which provides that 'every court having jurisdiction under the Act to wind up companies may review or vary an order made by it in the exercise of that jurisdiction'. A statement of law, though orbiter and not binding as a precedent may still be of a persuasive value. Thus any reliance on English cases decided pursuant to the Insolvency Rules 1986 in furtherance of an argument that our court has the power to set aside a winding up order after it had been made, perfected and duly sealed would be of no consequence. *Re Calmex Ltd & Anor*, was a decision based on r 7.47 of the Insolvency Rules 1986.

[16] McPherson and JO Donovan, *The Law of Company Liquidation* (3rd Ed) at the footnote of p 443, states:

> It is improper to apply for an order rescinding the winding up order: *Re Baxters* [1898] WN 60; *Compare Re Nicholls Pty Ltd & The Companies Act* (1982) 7 ACLR 76. As to termination or rescission of a winding up order, see *Quicksafe Freightlines Pte Ltd v Shell Company of Australia Ltd* (1985) 3 ACLC 257 which confirms that s 383 provides only for a stay or termination of the winding up. It does not contemplate that the winding up might be rescinded or set aside.

[17] The power of the court to set aside or rescind a winding up order under its inherent jurisdiction after it has been made is not unlimited. There is ample authority in support of this. Derek French in his book, *Applications to Wind up Companies* (1993) at p 145 illustrates some of the instances in which the court had exercised its inherent jurisdiction to set aside a winding up order:

A The court has an inherent jurisdiction to set aside an order which it has made if the order is so fundamentally defective that it should be treated as null (*Re South African Syndicate Ltd* (1883) 28 SJ 152, in which a contributory's petition had been presented by a person who was in fact disqualified from petitioning by what is now the Insolvency Act 1986, s 124(2); *Re Blatt Ray Inc* (1939) 20 CBR 447, B in which a contributory's petition had been presented by a person who was not a contributory; *Re Samoana Press Co Ltd* [1987] 4 NZCLC 64 at p 119, in which the petition had not been served on the company; in *Re KW and LM Powell Ltd* [1983] 1 NZCLC 98 at p 704, in which an application was made but there was no evidence of any miscarriage of justice calling for the exercise of the jurisdiction). Also, a fundamentally defective winding up order may be rescinded under the C power to rescind given by the Insolvency Rules 1986, r 7.47(1), which is discussed in 5.3 (*Calmex Ltd & Anor v C Lila Ltd & Ors* [1989] 1 All ER 485).

[18] *Palmer's Company Law* (24th Ed) at p 1389 states:

D

> The court has inherent power to rectify or rescind an order before it is drawn up … The court can correct an order even after it has been drawn up if it does not express its intention. Apart from this an order cannot be rescinded after it has been drawn up even though it was obtained by mistake or is bad on the face of it. The court has no jurisdiction to rehear a case after the order has been perfected. Any E further proceedings to discharge or vary or challenge the order must be by way of appeal or an application to stay proceedings under s 147 of the Act.

[19] *Sri Hartamas Development Sdn Bhd*, is a case in point where the F appellant appealed against the winding up order made against it.

[20] In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 Mohd Azmi FCJ at p 409 cautioned against any attempt to widen the door of the inherent jurisdiction and discretionary G jurisdiction of the superior courts to set aside a defective order without recourse to normal appeal procedure:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of H the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke I the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[21] In *Bridon New Zealand Ltd v Tent World Ltd*, the respondent was wound up without its knowledge as the winding up proceedings were served at its previous address, which was also the address of its principal shareholder, one Mr Artus. He had moved from that address following a fire. Upon learning of the winding up order he promptly applied to set aside or stay the order. All parties, including the official assignee agreed that the order should be stayed. Thomas J granted an interim order staying the winding up order.

[22] But Thomas J then went on to consider whether the winding up order could be rescinded rather than stayed. He acknowledged that there is ample authority that a winding up order cannot be rescinded: see *Kensington Swan v New Zealand Fisheries Ltd* [1989] 2 PRNZ 141; *Re Crown Bank* (1890) 44 Ch D 634; *Krextile Holdings Pty Ltd v Widdows Re Brush Fabrics Proprietary Ltd* [1974] VR 689; *Re XL Petroleum Pty Ltd* [1971] VR 560; *Ross v PJ Heeringa Ltd* [1970] NZLR 170; *Re Intermain Properties Ltd* [1986] BCLC 265; and *Re Kim Maxwell Ltd* [1992] 1 NZLR 69. Mr Hickey, counsel for the contributory in that case pointed out that a winding up order could be rescinded if it has not been sealed or otherwise perfected.

[23] Thomas J nevertheless proceeded to make on order rescinding the winding up order pursuant to r 486 of the High Court Rules which states that any verdict or judgment obtained where one party does not appear at the trial may be set aside or varied by the court on such terms as may seem just if it appears to the court that there has, or may have been, a miscarriage of justice. He was of the view, that having regard to r 7.47(1) of the Insolvency Rules 1986, it was open to the court to review the rule and discard it on the basis that it 'has outlived its usefulness'. But at the end of his judgment he did take into account Mr Hickey's submission and made an alternative order recalling and setting aside the winding up order pursuant to r 540 on the ground that it has not be drawn up and sealed. This is what Thomas J said at p 732:

> Even if I am wrong in rescinding the order … I consider that it is open to me to recall and set aside the order pursuant to r 540. Under this rule, the court may recall a judgment at any time before a formal record of it has been drawn up and sealed.

The weight of authorities seems to suggest that a winding up order which had been perfected and sealed cannot be set aside or rescinded.

[24] The High Court cases relied upon by the appellant are clearly distinguishable. The issue whether the High Court has the jurisdiction to set aside a winding up after it was perfected and duly sealed was not considered in *Teng Foh t/a Teng Foh Construction v Liwu Realty Sdn Bhd*, and in *Mui Bank Bhd v Golden Hornbill Hotel Sdn Bhd*. In *City Audio Sdn Bhd v Pengangkutan*

Kargo Udara Mas Sdn Bhd, the High Court held that it has jurisdiction to set aside a winding order made in default under O 35 r 2 of the Rules of the High Court 1980 (RHC). In that case the order was made in absence of respondent's counsel who was taken ill. It must be noted that all these cases were decided before the decision of the Court of Appeal in *Vijayalaksmi*'s case.

[25] There is no express provision in the Companies Act 1965 or in the Companies (Winding Up) Rules 1972 similar to r 7.47(1) of the Insolvency Rules 1986. In the United Kingdom, before the Insolvency Rules 1986 came into force a winding up order could not be rescinded after it had been drawn up. The only remedy was to apply for a stay: *Re Intermain Properties Ltd* [1986] BCLC 265 or to appeal. See also *10 Atkin's Court Forms* (2nd Ed) (1992 issue) at p 384; Derek French, *Applications to Wind up Companies* at p 146. Until a similar provision is introduced into our Companies Act 1965 or Companies (Winding Up) Rules 1972 we are of the considered view that a winding up which had been perfected and duly sealed cannot be set aside or rescinded save in those circumstances where the court may exercise its inherent jurisdiction. Order 35 r 2 of the RHC cannot be invoked to set aside a winding up order on the ground that it was made in default as the Companies Act 1965, being a special law on matters pertaining to companies winding up does not expressly provide for it. Order 1 r 2(2) of the RHC states that the High Court rules shall have no effect in relation to proceedings in respect of which rules have been made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings. The proper remedy which is provided by the Companies Act 1965 is to apply for a stay under s 243 as was pointed out in *Vijayalaksmi*'s case or to appeal against the winding up order as was done in *Sri Hartamas Development Sdn Bhd*. The court should refrain from the temptations of deciding a case on the basis that a provision similar to r 7.47 of the Insolvency Rules 1986 should have been introduced into the Companies Act 1965 or the Companies (Winding Up) Rules 1972.

[26] For the above reasons we dismissed the appeal with costs and ordered that the deposit be paid to the respondent on account of taxed costs.

Appeal dismissed with costs.

Reported by Kohila Nesan